IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No 22 of 1994

in

SPECIAL CIVIL APPLICATION No 4988 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL
and
Hon'ble MR.JUSTICE P.B.MAJMUDAR

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

STATE OF GUJARAT

Versus

M.K. SHAH

Appearance:

MR SP SEN, AGP for Appellants

MR PARESH UPADHYAY for Respondent

CORAM : MR.JUSTICE J.M.PANCHAL
and
MR.JUSTICE P.B.MAJMUDAR

Date of decision: 29/11/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE J.M.PANCHAL)

By filing this appeal under Clause 15 of the Letters Patent, the appellants i.e. the State of Gujarat and the Gujarat Public Service Commission, have challenged legality of judgment dated December 3, 1993 rendered by the learned Single Judge (Coram : V.H.Bhairavia, J.) in Special Civil Application No. 4988/92, by which the appellants are directed to give appointment to the respondent, who was placed at serial no.32 in the waiting list, as Section Officer within four weeks from the date of receipt of the writ. We may state that the operation of the judgment rendered by the learned Single Judge is stayed by the Division Bench before which the appeal was listed for hearing vide order dated February 4, 1994.

2. In exercise of the powers conferred by the proviso to Article 309 of the Constitution of India read with the order by the President published in the Government of India, Ministry of Home Affairs, Order No.GSR/51/(E), dated February 17, 1980, the Governor of Gujarat has made rules called, "The Gujarat Civil Services Recruitment (Examination) Rules, 1980". Under the said rules, the Gujarat Public Service Commission is authorised to hold a combined competitive examination for selection of candidates for recruitment to the post/s mentioned in Schedule-I. The Gujarat Public Service Commission issued advertisement no.25, dated October 1, 1985 inviting applications for 101 posts in G.A.S. Class-I and 188 posts in G.A.S. Class-II. Out of 188 Class-II posts, 78 posts were of the Section Officer. In response to the advertisement, the respondent made an application and after following due procedure, she was selected for the post of Section Officer in Gujarat Administrative Service, Class-II by the Gujarat Public Service Commission. As per the statutory rules, the Commission has to publish the result of the examination in Official Gazette in two parts in respect of each Category-I and Category-II mentioned in Schedule-I. Part-I has to show the names and seat numbers of the candidates arranged according to merit showing total marks obtained by each candidate and whose names are recommended to Government for appointment. Part-II has to show the names and seat numbers of the candidates arranged according to merit showing total marks obtained by each candidate and who are to be kept in the waiting list. After selection, the respondent was placed at serial no.32 in the waiting list of 159 candidates for

Class-II posts. The case of the respondent was that the Gujarat Public Service Commission had recommended the name of candidates upto serial no.27 in the waiting list for Class-II and as the candidates at serial nos.25, 28 & 29 had declined the appointment offered to them, she was entitled to be appointed to the post of Section Officer. The claim made by the respondent was that though select list for the post of Section Officer was operative, she was denied appointment to the post of Section Officer arbitrarily. Under the circumstances, the respondent instituted Special Civil Application No. 4988/92 and prayed the Court to issue a writ of mandamus or a writ of prohibition or any other appropriate writ or order, directing the appellants to fill up all the 78 posts of Section Officers from the select/waiting list and consider her case for appointment to the post of Section Officer Officer in order of her merit as reflected in the select/waiting list. It was also prayed to direct the appellants to confer upon her all the consequential benefits including pay, seniority etc.,on the basis of her appointment to the post of Section Officer from the date it was due to be filled up by direct recruits.

3. On service of notice, the petition was contested by the respondents through an affidavit-in-reply of Mr. A.K.Vora, Under Secretary to Government, General Administration Department, Sachivalaya, Gandhinagar. In the said reply, it was mentioned that the respondent was placed at serial no.32 in the waiting list for Class-II post, but she was not entitled to be appointed as a Section Officer merely because she was placed in the waiting list. It was explained in the reply that there was no backlog of vacancies existing in the category of direct recruits to the post of Section Officer as was claimed by the respondent and, therefore, the petition should not be accepted by the Court. What was stressed in the said reply was that as per the statutory rules, waiting list prepared remains in force till the result of the next examination is declared by the Commission and as the result of the subsequent examination pursuant to subsequent requisition which also included the requisition for Section Officers, was declared on July 31, 1992, the respondent was not entitled to the relief claimed in the petition. By filing the reply, the appellants had demanded dismissal of the petition.

4. We may mention that the petition filed by the respondent was listed for admission hearing before the learned Single Judge on February 11, 1993 and ad-interim relief in terms of para-5 of the petition, which was as under, was granted.

"5. Pending admission, final hearing and disposal of this petition, Your Lordships may be pleased to grant interim relief by way of injunction order directing the respondent authorities not to treat the select/waiting list at Annexure-B as far as post of Section Officer is concerned, even after the declaration of the result of the next selection and direct the respondent-authorities to keep 3 posts of Section Officers vacant"

Subsequently, the matter was heard by another learned Single Judge of this Court for confirmation of interim relief and the learned Single Judge (Coram : C.K.Thakkar, J., as he then was) by a speaking order running into 5 pages had vacated the ad-interim relief granted earlier.

5. Thereafter the petition was taken-up for final hearing by the learned Single Judge. The learned Single Judge, who heard the petition, found that out of 78 vacancies required to be filled up by direct recruits, there were about 3 vacancies yet to be filled up from the general category. It was noticed by the learned Single Judge that from the select candidates, candidates at serial nos.10 & 13, namely, Mr. D.D.Shah and Mr. S.K.Langa respectively were appointed as Class-I officers, as they were also placed in the waiting list for Class-I officers and likewise, one Mr. Malek at serial no.46 in list Part-I of Class-II had opted for the post of Sales-tax Officer. The learned Single Judge noted that the candidate at serial no.24 was appointed as Class-II section officer from the select list Part-II i.e. waiting list and, therefore, 3 vacancies were required to be filled up from the list Part-II from serial no.24 onwards. It was pointed out to the learned Single Judge that candidates at serial nos.25, 28 & 29 had declined to accept the appointment; whereas the candidates at serial nos. 26, 27 & 30 had sought appointment as a Labour Officer, Sales-tax Officer or Mamlatdar and they were not seeking appointment to the post of Section Officer. In view of this state of affairs, the learned Single Judge was of the opinion that the candidates at serial nos.31, 32 & 33 in the list Part-II i.e. waiting list, were entitled for the appointment as Section Officers. The learned Single Judge placed reliance on the decision of the Gujarat High Court rendered in V.V.Bhramkshatriya & others vs. State of Gujarat and another, 31 G.L.R. 256 and held that the respondent was entitled to the reliefs claimed in the

petition. In view of the above-referred to conclusions, the learned Single Judge has accepted the petition filed by the respondent and directed the appellants to give appointment to the respondent as Section Officer within four weeks from the date of receipt of the writ, by judgment dated December 3, 1993, giving rise to the present appeal.

6. Mr. S.P.Sen, learned A.G.P. submitted that the candidate, who is placed in the waiting list, has no indefeasible right to be appointed to a post and, therefore, the petition filed by the respondent could not have been allowed by the learned Single Judge. According to the learned A.G.P., the result of the subsequent examination held by the Gujarat Public Service Commission pursuant to the subsequent requisition, which included requisition for Section Officer, had been declared on July 31, 1992 and as the waiting list in which the respondent was placed at serial no.32 was not operative in terms of Rule 18(i) of the Gujarat Civil Services Recruitment (Examination) Rules, 1980, the petition could not have been accepted by the learned Single Judge. What was urged by the learned counsel for the State Government was that the direction given by the learned Single Judge to the appellants to appoint the respondent as a Section Officer officer within four weeks from the date of receipt of the writ, is contrary to well settled principles of service jurisprudence enunciated by the Supreme Court in several reported decisions and, therefore, the appeal should be allowed.

7. Mr. Paresh R.Upadhyaya, learned counsel for the respondent, contended that though as per the advertisement 78 vacancies were required to be filled up by direct recruits, there were about 3 vacancies which were not filled up and as the candidates at serial nos.31, 32 & 33 in the waiting list were entitled to be appointed as Section Officers, the direction given by the learned Single Judge to the appellants to appoint the respondent as a Section Officer cannot be regarded as illegal. The learned counsel for the respondent emphasised that the waiting list is prepared to make appointment by direct selection in case more vacancies are available and as vacancies were available, the direction given by the learned Single Judge to appoint the respondent to the post of Section Officer by operating waiting list, should not be interfered with by this Court in the present appeal.

8. We have heard the learned counsel for the parties and taken into consideration the documents forming part

of the original petition. A bare reading of Rule-18 of the Gujarat Civil Services Recruitment (Examination) Rules, 1980, makes it manifest that the waiting list prepared by the Gujarat Public Service Commission remains in force till the result of the next examination is declared by the Commission, but if any post is not advertised for the next examination, the waiting list for such post remains in force till the result of any subsequent examination for which such post is advertised, is declared by the Commission. In para-2 of the affidavit-in-reply filed by Mr. A.K. Vora, Under Secretary to Government, G.A.D., Sachivalaya, Gandhinagar, it has been specifically pointed out that the result of the subsequent examination conducted by the Gujarat Public Service Commission pursuant to the subsequent requisition, which included requisition for Section Officers, was declared on July 31, 1992. Though the respondent had filed rejoinder affidavit to the affidavit-in-reply filed by Mr. Vora, this averment made in the affidavit-in-reply was not controverted. In order to satisfy ourselves about the true state of affairs, we had directed the learned A.G.P. to produce the original record before us for our perusal and accordingly, the original record has been made available for our perusal. The record shows that in the year 1988, requisition was received from the concerned department of the Secretariat and, therefore, an advertisement was issued inviting applications for the posts mentioned therein which did not include the posts of Section Officer. Thereafter the Gujarat Public Service Commission had issued advertisement no. 200 on March 15, 1990 inviting applications for the posts in G.A.S.Class-I and G.A.S.Class-II, which included posts of Section Officers also. A perusal of the Gujarat Government Gazette dated August 6, 1992, Vol.32 makes it evident that the result of the examination held pursuant to advertisement No.200, dated March 15, 1990 was declared by the Commission on July 31, 1992. Thus, it becomes manifest at once that when the petition was heard by the learned Single Judge on December 3, 1993, the waiting list was not in operation because Rule-18 of the Rules, inter-alia, provides that the waiting list shall remain in force till the result of the next examination is declared by the Commission, but if any post is not advertised for the next examination, the waiting list for such post shall remain in force till the result of any subsequent examination for which such a post is advertised, is declared by the Commission. As the waiting list was not in operation and had exhausted its life, the learned Judge, in our confirmed view, could not have directed the appellants to give appointment to the respondent as a

Section Officer within the time prescribed in the impugned judgment. It is relevant to observe that the learned Single Judge was hearing a petition filed under Article 226 of the Constitution. It is well settled that power under Article 226 has to be exercised to effectuate the regime of law and not for abrogating it. Even while acting in exercise of the said constitutional power, the High Court cannot ignore the law, nor can it override it. The power under Article 226 is conceived to serve the ends of law and not to transgress them. Further the effect of the direction given by the learned Single Judge is that the appellants will have to disobey the statute viz. The Gujarat Civil Services Recruitment (Examination) Rules, 1980. In our view, the High Court while exercising powers under Article 226 of the Constitution, cannot by its fiat direct any one to disobey the statute because such a direction would be destructive of the rule of law. We may state that the validity of the Gujarat Civil Services Recruitment (Examination) Rules, 1980 is not the subject matter of challenge before us. In view of the provisions of Rule 18 of the said Rules, the learned Single Judge could not have directed the appellants to appoint the respondent to the post of Section Officer because such a direction tantamounts to directing the appellants to operate the waiting list, though it had exhausted its life and was not operative at all. Having regard to the facts of the case, we are of the opinion that the direction given by the learned Single Judge to the appellants to appoint the respondent to the post of Section Officer, is totally illegal and liable to be set aside.

For the foregoing reasons, the appeal succeeds. The direction given by the learned Single Judge to the appellants to appoint the respondent to the post of Section Officer within the time prescribed therein, is hereby set aside. The appeal is allowed with no order as to costs.

(J.M.Panchal,J.)

(P.B.Majmudar,J.)

(patel)